No. 22[illegible] and No. 22602

In the United States Court of Appeals for the Ninth Circuit

HOWFIELD, INC., PLAINTIFF-APPELLANT

v.

UNITED STATES OF AMERICA, ET AL., DEFENDANTS

UNITED STATES OF AMERICA, ET AL., PETITIONERS

v.

WILLIAM H. AHMANSON, RESPONDENTS-APPELLANTS

On Appeal from the Orders of the United States District Court for the Central District of California

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BRIEF AND APPENDIX FOR THE APPELLEES

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In the United States Court of Appeals for the Ninth Circuit

No. 22609

HOWFIELD, INC., PLAINTIFF-APPELLANT

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BRIEF FOR THE APPELLEES

STATEMENT OF THE ISSUES PRESENTED

1. Whether the order of the District Court, dismissing the action of Howfield, Inc., for the suppression of evidence without deciding the merits of the complaint, is a final, appealable order.

2. Whether, if the order is appealable, the District Court committed reversible error in dismissing the complaint.

3. Whether, in proceedings to enforce Internal Revenue summonses calling for corporate records, appellants had an adequate remedy at law by opposing enforcement, with the result that the District Court correctly dismissed their counterclaim seeking injunctive relief and to have Section 7602 of the Internal Revenue Code of 1954 (conferring the summons power) declared unconstitutional by a three-judge district court.

4. Whether, in any event, appellants presented a substantial question concerning the constitutionality of Section 7602.

STATEMENT OF THE CASE

These appeals arise from the dismissal without prejudice of an action brought by Howfield, Inc. for the suppression of evidence (Case No. 22609 in this Court) and from the dismissal for lack of jurisdiction of a counterclaim filed by Howfield, Inc. and its president (William H. Ahmanson) in proceedings against them for the enforcement of four Internal Revenue summonses calling for the production of corporate records.

Both actions were commenced on April 5, 1967. (No. 22609, C. T. 2; No. 22602, C. R. 2.)[1] The ac-

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[1] "C. T." will be used to refer to the Clerk's Transcript, i.e., Volume One of the transcript of record in each case. "R. T." will be used to refer to the court reporter's transcript

tion for suppression was dismissed on December 6, 1967. (No. 22609, C. T. 226-227.) The counterclaim was filed in the enforcement proceeding on December 29, 1967. (No. 22602, C. T. 4899), and was dismissed on January 18, 1968. (No. 22602, C. T. 83-84.) Notices of appeal were filed, respectively, on December 14, 1967, in the suppression action (No. 22609, C. T. 232) and on February 1, 1968, in the enforcement proceeding (No. 22602, C. T. 85, 99.)

1. The action to suppress evidence (No. 22609)

On April 5, 1967, Howfield, Inc., a California corporation, filed a complaint in the District Court (No. 22609, C. T. 2-3)[2] alleging that at various times during November and December, 1966, and January, 1967, the corporate records of Howfield, Inc., "were unlawfully seized, copied and taken from it" by agents of the Internal Revenue Service, and prayed for the return of all documents and copies and for the suppression of all evidence thus obtained "in any criminal proceeding in this judicial district" (No. 22609, C. T. 3). The complaint and its incorporated attachments alleged (No. 22609, C. T. 2-10): that Special Agent Dennis told counsel on November 23, 1966, that access to the records of Howfield, Inc., was desired in connection with an investigation of nine other tax-

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in each case. Thus, we conform our usage to that of appellant's brief (Br. 1-2).

[2] This complaint named as respondents the United States, the United States Attorney (William M. Byrne, Jr.), the Chief, Intelligence Division, Internal Revenue Service (Robert H. Lund), and two special agents of that Service (Gabriel Dennis and Ben Hayes).

payers, and that Howfield, Inc., was a third party to this investigation; that Dennis was told that access would be given only upon service of a summons; that on December 7, 1966, nine Internal Revenue summonses were served requiring the production of Howfield's records "as they pertained to each of the nine named investigatees" (No. 22609, C. T. 5-6); that on December 19, 1967, counsel appeared at the Federal Building in Los Angeles and delivered to Dennis all cancelled checks and invoices between Howfield and the named investigatees for the years specified in the summonses; that Dennis stated that he also wanted to see records concerning indirect transactions but was told that there had been no such transactions; and that on January 31, 1967, Dennis served new summonses on Howfield, Inc.,[3] and stated "that in the past plaintiff had been a third party investigatee, but that as of that day it was the subject of a full scale criminal investigation"; that Howfield, Inc., contended that it was "the subject of a criminal investigation" when the agents first visited it on November 3, 1966 and that "through fraud and deception" consent to examine its records had been obtained; and that "a pattern of fraud" had been practiced on "other taxpayers" as well as upon Howfield, Inc. (No. 22609, C. T. 6-7).

On April 13, 1967, the Government filed a motion to dismiss the action for suppression (No. 22609,

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[3] These summonses were entitled "In the matter of the tax liability of Galaxy, Inc." (No. 22609, C. T. 11-12.) It is undisputed that Howfield, Inc., is the successor to Galaxy, Inc.

C. T. 29-31), asserting lack of jurisdiction on the ground that all the corporate records and copies thereof received from Howfield, Inc. had been returned to it. Attached to this motion were a memorandum of points and authorities (No. 22609, C. T. 32-45) and the affidavits of Special Agent Dennis and other agents (No. 22609, C. T. 46-60).

In his affidavit, Special Agent Dennis stated, *inter alia*, that on November 3, 1966, he directed that Galaxy, Inc. be contacted as a third party witness, in order to examine the records of that corporation concerning a few transactions between it and certain taxpayers who were then under investigation; that Galaxy, Inc., was then treated merely as a third-party witness because the transactions in question were few and were of inconsequential amounts; that he accordingly told Mr. Weiss on November 9 and November 23, 1966, that he was interested in Galaxy, Inc., only as a third-party witness; that at the request of Mr. Weiss he issued nine summonses on December 7, 1966, and on that day Messrs. Weiss and Hannam produced eight original checks and seven original invoices of Galaxy, Inc., but no other books or records; that up to that time he ("my office"—No. 22602, C. T. 56) had no knowledge of the transactions reflected by these documents; that based on those checks and invoices, involving substantial amounts payable to some of the nine public relations forms already under investigation, on January 26, 1967, an assignment was made for a preliminary investigation of Galaxy, Inc., and on January 31, 1967, Dennis informed Mr. Weiss that because of the new information Galaxy, Inc., would

"be the principal of an investigation" (No. 22609, C. T. 56); that when he then asked for the cooperation of Howfield, Inc., for the production of the books and records of Galaxy, Inc., Mr. Weiss requested that summonses be served; that four summonses, accordingly, were then served; that these summonses had not been complied with, and that Special Agent Dennis had never seen any books or records of Galaxy, Inc., except the eight checks and seven invoices; and that he had (No. 22609, C. T. 57) "caused to be returned all documents and all copies of said documents given to me by Mr. Weiss on December 19, 1966."

In an affidavit subsequently filed (No. 22609, C. T. 96-100), Mr. Weiss stated that on April 13, 1967, two special agents of the Internal Revenue Service came to his office, handed him a sealed envelope, and asked him to sign a receipt; that he counted the documents and signed a receipt, a copy (id., p. 100) of which was attached to the affidavit. This receipt acknowledged delivery of "51 sheets of paper which are copies of checks and invoices."

On December 9, 1967, Judge Curtis signed an order (No. 22609, C. T. 228-231) granting the Government's motion to dismiss the action for the supression of evidence, concluding that the case was controlled by this Court's decision in *Hill* v. *United States*, 346 F. 2d 175, rather than by this Court's decision in *Goodman* v. *United States*, 369 F. 2d 166, since the Government had represented that all of the material obtained from Howfield had been returned, and Howfield had made no effort to prove the contrary.

2. The summons enforcement proceedings (No. 22602)

On April 5, 1967, a petition was filed in the District Court on behalf of the United States and Special Agent Dennis against Howfield, Inc., and William H. Ahmanson as its president, pursuant to Sections 7402 (b) and 7604(a) of the Internal Revenue Code of 1954, seeking enforcement of four Internal Revenue Summones which had been issued and served on January 31, 1967, requiring the production of specified corporate books and records of Galaxy, Inc., for fiscal years ending on August 31, of 1962, 1963, 1964, and 1965. (No. 22602, C. T. 2-10, 98.) These summonses (No. 22602, C. T. 7-10) are entitled: "In the matter of the tax liability of GALAXY, INC. [of] Los Angeles, California," and in an affidavit (No. 22602, C. T. 11-13) supporting the petition Special Agent Dennis stated, *inter alia*, that it was necessary to examine the books and records in question in order to ascertain the correct income tax liability of Galaxy, Inc., for the fiscal years specified (id., p. 13).

On December 29, 1967 (after dismissal of the action for the suppression of evidence), Howfield, Inc. and Ahmanson filed an "Answer and Counterclaim for Injunctive Relief" (No. 22602, C. T. 48-56).

The answer asserted four affirmative defenses: (1) that the summonses constituted an unlawful search and seizure and a denial of the effective assistance of counsel and otherwise violated the Constitution of the United States because they were issued (No. 22602, C. T. 49) "for the invalid purpose of obtaining evidence for use in a criminal investigation;" (2) that

Section 7602 of the 1954 Code violates the Fourth, Fifth, and Sixth Amendments to the Constitution; (3) that the agents involved had practiced deceit by misrepresenting the nature, scope, and subject of the investigation, in violation of the foregoing Amendments; (4) that the investigation of Howfield, Inc., and of other firms was "part of a widespread scheme of fraud and deceit," making the summonses here involved violative of the foregoing Amendments.

The counterclaim (No. 22602, C. T. 51-56) alleged that the summonses here involved, as well as those issued to other persons not named, were in furtherance of a criminal investigation being conducted by the Intelligence Division of the Internal Revenue Service; that if Section 7602 of the 1954 Code authorizes such use it is repugnant to the Fourth, Fifth, and Sixth Amendments and also is too vague and indefinite; that Section 7602 should be declared null and void and the United States should be permanently enjoined from attempting to utilize its provisions; that a three judge district court should be convened since a substantial question had been presented concerning the constitutionality of Section 7602, and since Howfield, Inc. and Ahmanson did not have an adequate remedy at law. The counterclaim further alleged (pars. VII through X, No. 22602, C. T. 53-55) that, whether or not Section 7602 is unconstitutional, evidence had been obtained by deceit, and thus by an unlawful search and seizure, with the result that all use and dissemination of such knowledge or information should be enjoined, and the United States and Dennis should be permanently restrained from attempting to

enforce the summonses in question and from utilizing any summonses directed to anyone else, "as part of the criminal tax investigation of Howfield, Inc." (No. 22602, C. T. 55).

On January 18, 1968, an order was entered dismissing the above-described counterclaim and denying the application for the convening of a three-judge district court, on the ground that there was no basis for equitable relief, since Howfield, Inc. and Ahmanson had an adequate remedy at law. (No. 22602, C. T. 83-84, 99.)

SUMMARY OF ARGUMENT

The order of the District Court, dismissing the complaint brought by Howfield for the return of documents and the suppression of evidence, without any decision on the merits, is not a final, appealable order because all the documents obtained from Howfield and all copies thereof made by the government had been returned to Howfield, and nothing remained except a premature request for the suppression of evidence in some future criminal case.

Even if the district court's order were appealable, the District Court did not err in dismissing the complaint as premature.

In addition, Howfield and Ahmanson responded to the Government's petition to enforce Internal Revenue summonses by filing not only answer, but also a counterclaim seeking injunctive orders against the enforcement of the summonses involved in the Government's petition and of any past or future summonses, concerning Howfield's tax liabilities or tax fraud,

against anyone else. The counterclaim also requested that a three-judge court be convened for the purpose of declaring Section 7602 of the 1954 Code unconstitutional, particularly when utilized by a special agent of the Intelligence Division of Internal Revenue Service.

The District Court's dismissal of the counterclaim was correct, since in part it sought the same premature relief requested in the suppression action previously described. As to the remaining parts of the counterclaim, appellant had an adequate remedy at law in opposing the enforcement proceedings, and had no standing to enjoin the use of summonses against unknown third persons in the future. Since appellants did not state a case for an injunction, the District Court properly dismissed the counterclaim without taking steps toward convening a three-judge district court to decide upon the constitutionality of Section 7602. Furthermore, there is no substantial question, in any event, concerning the constitutionality of Section 7602, or the propriety of the utilization of an administrative summons by a special agent of the Intelligence Division of the Internal Revenue Service.

ARGUMENT

I

The District Court Did Not Err In Dismissing the Proceedings for the Suppression of Evidence and Its Order Is Not Appealable

A. *Introduction*

Howfield's complaint sought the return of "the property, documents and/or copies thereof" (No. 22609, C. T. 2) which Messrs. Weiss and Hannam had voluntarily turned over to Special Agent Dennis on December 19, 1966 (id., C. T. 55-56), and also sought injunctive relief suppressing the use of evidence derived directly or indirectly from the documents "in any criminal proceeding in this judicial district" (id., C. T. 2).

The Government, in a motion signed by Assistant United States Attorney Magnuson and filed on April 13, 1966 (No. 22609, C. T. 61-74, 240), stated to the District Court (No. 22609, C. T. 68) that "The only corporate records ever turned over to the defendants by plaintiff or its counsel consisted of *copies* of 8 checks and 7 invoices. All copies (including copies thereof) so received have been returned to plaintiffs' counsel." (Emphasis added.) See also, to the same effect, the affidavit of Special Agent Dennis (No. 22609, C. T. 56-57, 85-86), and other statements in memoranda signed by the Assistant United States Attorney (id., C. T. 31, 34, 35, 37, 63, 67).[4]

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[4] For example, the Government stated that "The defendants no longer have possession or custody of any of plaintiff's corporate records or copies thereof (8 checks, 7 invoices),

Howfield's counsel, Mr. Weiss, conceded in his affidavit (No. 22609, C. T. 97) that on April 13, 1967, two special agents delivered to him an envelope and told him to open it, and that he gave a receipt (id., C. T. 100) acknowledging receipt of "51 sheets of paper which are copies of checks and invoices."

In a memorandum opposing the Government's motion to dismiss the suppression proceedings, Attorney Weiss contended that the affidavit of Special Agent Dennis did not make it clear that all copies had been returned to him. (No. 22609, C. T. 110.)[5] In a reply memorandum signed by Assistant United States Attorney Magnuson, the Government stated in part as follows (No. 22609, C. T. 127):

> The record shows, and Government counsel here so states to this Court, that all copies (which of course includes copies of copies) have been returned to the plaintiff.

In an order entered December 7, 1967 (No. 22609, C. T. 228, 231), dismissing the proceedings for suppression of evidence, the District Court concluded that "The rationale of *Hill* v. *United States*, *supra* [346 F. 2d 175 (C.A. 9th)] appears to be controlling here." In the same order, the Court had observed (id., C. T. 229):

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turned over to them by plaintiff's counsel." (No. 22609, C.T. 31).

[5] In the same memorandum, it was contended that it was, in any event, immaterial whether all copies had been returned or not, since the information could not be "blotted out" from the memories of the Internal Revenue agents involved. (No. 22609, C. T. 111.)

> After the action was filed, the agents returned, what the court assumes to be all, the books and records so seized. It is the position of the Government that this was done, and although the plaintiff admits receipt of books and records, it does not admit having received all of the papers. However, since the plaintiff has made no effort to discover or prove to this court, nor has it in fact contended in its argument, that any paper or document seized has not been returned, the court assumes this has been done.[6]

We submit that the District Court was clearly correct, and certainly did not abuse its discretion, in accepting the explicit representation of the Assistant United States Attorney that *all* copies (including copies of copies) of the checks and invoices obtained from Howfield had been returned to Attorney Weiss, and that the Government no longer had possession of any such material. It follows, from this Court's decision in *Hill* v. *United States* 346 F. 2d 175, (1) that the District Court did not err in dismissing the proceedings without any ruling on the merits, and (2) that the order of dismissal was not a final, appealable decision.

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[6] In an application to compel answers to interrogatories, filed November 17, 1967, the Government noted that 40 days had elapsed, and noted that "while the plaintiff has stated that he wishes to conduct discovery, he has made no effort to reset the depositions previously scheduled." (No. 22609, C.T. 217-218, 241.) On June 30, 1967, the District Court had denied the Government's motion to quash Howfield's notices of depositions. (No. 22609, C. T. 147.)

B. *The District Court's order is not appealable*

In *Hill* v. *United States*, *supra*, the taxpayer (Hill) moved for the return of documents and the suppression of evidence; the documents were returned and the taxpayer apparently acquiesced in the Government's retention of copies; the District Court then denied the further relief of suppression. This Court, on the basis of *DiBella* v. *United States*, 369 U.S. 121, held that the order was not appealable, observing (p. 178):

> "DiBella requires *both* a request for return of property *and* independence from the criminal case before the order denying return becomes appealable." [7]

Clearly, this Court's holding in *Hill* v. *United States*, *supra*, was correct, since in view of the taxpayer's acquiescence in the Government's retention of copies, nothing remained except his request for the suppression of evidence. Not only were the proceedings not solely (see *DiBella* v. *United States*, *supra*, pp. 131-132) for the return of property; they were not any longer proceedings for the return of property to all.

Similarly here, once all copies of the checks and invoices obtained from Howfield (together with copies of the copies made by the Government) were re-

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[7] In *DiBella* v. *United States*, *supra*, pp. 131-132, the Supreme Court stated as follows:

> Only if the motion is *solely* for return of property *and* is in no way tied to a criminal prosecution *in esse* against the movant can the proceedings be regarded as independent. [Emphasis added.]

turned,[8] the proceeding was not solely for the return of Howfield's property, but was exactly the opposite, *viz.*, a proceeding solely for the suppression of the future use of evidence in a hypothetical future criminal case. Howfield seemingly attempts to escape from the conclusion that the order here involved is not appealable, by complaining that there was a "forcible return" (Br. 9). That description is not borne out by the affidavit of Howfield's counsel (No. 22609, C. T. 97), and it taxes the imagination to conceive of a "forcible" return in speedy compliance with Howfield's complaint seeking that very event. The fact is that everything was returned, and Howfield can hardly complain if compliance with its demands has the collateral result of extinguishing a right to appeal a non-prejudicial ruling dismissing its action.

This Court's subsequent holding in *Goodman* v. *United States*, 369 F. 2d 166, does not affect the holding of *Hill* v. *United States*, *supra*, as applied to the present case; rather, it confirms that application. The distinction made in *Goodman* was that, although in that case all original records had been returned, the taxpayers were still seeking the return of the copies made by the Government. Construing such copies as "property", within the meaning of *DiBella*, this Court held that the order of the District Court, denying relief, was appealable. The instant case falls within the holding in *Hill*, because all reproductions of the copies obtained from appellant were returned.

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[8] The originals were never turned over to the Government. (No. 22609, C. T. 68.) Appellants have never denied this assertion.

Furthermore, this Court's holding in *Goodman*, that Goodman would be entitled to the return of copies, made by the Government, of documents illegally obtained from him, now appears incorrect in the light of the Supreme Court's subsequent statement that there is "no possible common law claim * * * for the return of copies made by the Government of the papers it had seized," and that the "remedy of suppression * * * satisfied that demand." *Maryland Penitentiary* v. *Hayden*, 387 U.S. 294, 305. In *Meister* v. *United States, et al.*, decided July 8, 1968, the Third Circuit dismissed an appeal in a case similar to this one and said:

> Plaintiff asserted in his amended complaint that the defendants [Internal Revenue agents] illegally made copies of his records but he did not specifically request their return. We do not view the absence of such a request decisive because, assuming it had been made, it would not affect our decision.

C. ***The District Court did not abuse its discretion, even if its order of dismissal were appealable***

Even if the order of the District Court, dismissing Howfield's complaint (No. 22609, C. T. 228-231), is to be regarded as an appealable order, it is clear that the dismissal was in complete accord with this Court's views in *Hill* v. *United States*, *supra*, and also with the principle that a District Court may, in the exercise of discretion, decide to defer until a more appropriate time any ruling on whether evidence has been acquired in such manner as to render it inadmissible in some future proceeding.

In *Hill* v. *United States*, *supra*, this Court not only held that the denial of suppression was not final or appealable, but also addressed its remarks to the status of the case at the District Court level, observing (346 F. 2d, p. 178):

> All that remains on this attempted appeal is the district court's order denying appellant's motion to suppress evidence. Since this attempt to suppress evidence has developed before any action has even been commenced, and, for that matter, has developed where an action may never even be commenced, we find this motion is nothing more than a premature request. If a criminal prosecution does subsequently take place, appellant can raise a motion to suppress any evidence which the government may have secured in violation of his constitutional rights.

Clearly, by the foregoing language this Court sanctioned and perhaps even required, the very course adopted by the District Court here.[9]

Furthermore, the District Court's action is sanctioned by the quite general view that a District Court may, as a matter of discretion, dismiss without prejudice a proceeding for the suppression of evidence,

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[9] In *Goodman* v. *United States*, *supra*, the District Court did not follow any such course, but, rather, held an evidentiary hearing and rendered a decision on the merits, including findings of fact that no deceit had occurred. Thus, the taxpayer in *Goodman* suffered some degree of prejudice, even if the findings were regarded as entitled merely to great weight or respect on the part of the judge in a future criminal case. Here, the dismissal was not on the merits and necessarily was without prejudice to renewal of the objection in the event that a criminal case might arise in the future.

especially where there is no pending criminal case depending on a resolution of the dispute. See, e.g., *DiBella* v. *United States*, *supra*, pp. 128-129, fn. 9; *Rodgers* v. *United States*, 158 F. Supp. 670 (S.D. Cal.), mandamus and prohibition denied, 158 F. Supp. 670 footnote p. 684 (C.A. 9th); *Centracchio* v. *Garrity*, 198 F. 2d 382, 386-389 (C.A. 1st), certiorari denied, 344 U.S. 866; *Chieftain Pontiac Corp.* v. *Julian*, 209 F. 2d 657 (C.A. 1st); *Eastus* v. *Bradshaw*, 94 F. 2d 788 (C.A. 5th); *Goodman* v. *Lane*, 48 F. 2d 32, 35 (C.A. 8th); *Austin* v. *United States*, 353 F. 2d 512 (C.A. 4th); *Benes* v. *Canary*, 224 F. 2d 470, 472 (C.A. 6th), certorari denied, 350 U.S. 913.

Thus, in *Centracchio* v. *Garrity*, *supra*, (cited with approval in *DiBella* v. *United States*, *supra*, p. 128), a taxpayer filed a pre-indictment petition to suppress evidence allegedly obtained from him by revenue agents by deceit. The District Court denied the petition on the merits; the First Circuit vacated that order and remanded the case "with direction to enter an order dismissing the petition for want of equity." (198 F. 2d p. 389). The Court opinion (by Magruder, C.J.) observed (p. 386) that, although it could not be said that the District Court lacked jurisdiction (since a court has jurisdiction to discipline its own officers, e.g., the United States Attorney), "the propriety of exercising such jurisdiction depends upon considerations of an equitable nature." The Court concluded that the District Court (p. 388) "should have dismissed the petition as lacking in equity," having first noted that the case involved no *actual* search and seiz-

ure, and having taken the view that pre-indictment suppression should be sparingly exercised.

In *Chieftain Pontiac Corp.* v. *Julian*, 209 F. 2d 657, (C.A. 1st), the Court, in a similar case involving alleged false representations by revenue agents, observed (p. 659) that in *Centracchio* v. *Garrity*, *supra*, "we tried to indicate our lack of enthusiasm for these petitions to suppress evidence, filed at a pre-indictment stage." The Court decided that a false representation concerning eligibility for the benefits of the non-disclosure policy does not constitute an "unreasonable search and seizure" (pp. 659-660), whether or not the evidence should be admitted at a trial, and concluded by saying (p. 660):

> In thus specifying that the dismissal should be without prejudice, the district court was merely following what we said in the *Centracchio* case, 198 F. 2d at page 388, that such questions as to the admissibility of evidence which may be produced by the government at some future criminal trial ought not to be determined by the district court, or by us on appeal, upon petitions like the present ones for the suppression of evidence prior to indictment.

Although the existence of jurisdiction, the propriety of exercising it, and the right to an immediate appeal from a failure to exercise it (an ultimate appeal is always available, by appeal from conviction in a criminal case) are separate questions, they tend sometimes to merge. Thus, in *Austin* v. *United States*, *supra* (353 F. 2d 512), the Fourth Circuit, after the decision in *DiBella* v. *United States*, *supra*, reversed

its own earlier judgment (297 F. 2d 356) requiring the District Court to hold a hearing in a pre-indictment suppression proceeding, on the ground that under *DiBella* it lacked appellate jurisdiction, but added (353 F. 2d, p. 512):

> This order is not intended to indicate that the District Court may not in its discretion, hear the application for injunction prior to indictment, nor do we hereby intimate any opinion upon the merits of said application.

We submit that, even if the order of the District Court in the present case is appealable, nevertheless the order was free from error.

II

The District Court Did Not Err In Dismissing the Counterclaim In the Summons Enforcement Proceeding, or In Denying the Request for a Three-Judge District Court

After the dismissal of its action seeking the suppression of evidence, Howfield, Inc. (and its president, Mr. Ahmanson), on December 29, 1967, filed an answer and counterclaim for injunctive relief (No. 22602, C. T. 48-56) in the proceeding which the Government had commenced on April 5, 1967, seeking enforcement of summonses served on Ahmanson, as president of Howfield, Inc. (No. 22602, C. T. 7-10) for the production of corporate records of Galaxy, Inc., of which Howfield, Inc., was the successor. On January 16, 1968, the District Court dismissed the counterclaim and denied the application for the convening of a three-judge district court. (No. 22602,

C. T. 83-84.) Clearly, the District Court did not err in so doing.

In Paragraph "I" through "VI" of the counterclaim (No. 22602, C. T. 51-53) appellants asserted that Section 7602 of the 1954 Code, Appendix, *infra*, is unconstitutional if construed to authorize the use of a summons by a Special Agent, and that the United States should be permanently enjoined from utilizing Section 7602 or attempting to enforce summonses issued under it, whether against Howfield, Inc., or anyone else. It was prayed that a three-judge court be convened, pursuant to Title 28 U.S.C., Sections 2282 and 2284, Appendix, *infra*.

In paragraphs "VII" through "X" of the counterclaim (No. 22602, C. T. 53-55), appellants alleged that Internal Revenue agents had obtained information (without alleging from whom they obtained it) by means of deceit, in alleged violation of the Fourth Amendment concerning searches and seizures, and that all agents having such information should be enjoined from utilizing it.

The prayers of the counterclaim (No. 22602, C. T. 55-56) repeated substantially the same requests for relief, and amounted to a request that the Internal Revenue Service be enjoined from investigating Howfield, Inc. at all, for any purpose, whether by seeking information from Howfield, Inc., or anyone else.

This conglomeration of requests calls for some separation, for purposes of analysis.

First, there are the requests that because of the alleged deceit the Government should be enjoined from enforcing the four summonses which are the subject

of the existing enforcement action. Obviously, these requests do not present a situation calling for or permitting injunctive relief or equitable intervention, since appellants had an entirely adequate remedy at law by opposing or defending against the summons enforcement petition. They have availed themselves of that remedy, subsequent to the filing of the notices of appeal in these two cases, by presenting evidence designed to show the impropriety of enforcement of the summonses. A decision on the Government's petition to enforce is being considered by the District Court. Resort to equity is unnecessary. *Reisman* v. *Caplin*, 375 U.S. 440. Furthermore, since there were no grounds for an injunction, the District Court could properly dismiss the counterclaim without the convening of a three-judge district court, whether or not a substantial question exists concerning the constitutionality of Section 7602. See *Carrigan* v. *Sunland-Tujunga Telephone Co.*, 263 F. 2d 568, 572 (C.A. 9th); *Van Buskirk* v. *Wilkinson*, 216 F. 2d 735, 737-738 (C.A. 9th); *Jacobs* v. *Tawes*, 250 F. 2d 611 (C.A. 4th); *Linehan* v. *Waterfront Commission of New York Harbor*, 116 F. Supp. 401, 404-405 (S.D. N.Y.).

Secondly, there are the broad-scale requests, calculated, in effect, to stop all future investigation of Howfield, Inc., by enjoining all further attempts to obtain information or evidence from it or from anyone else, at least by the use of administrative summonses, and apparently even by asking for information from those who might be entirely willing to disclose it, if the desire to ask was in any way prompted by or related to any knowledge gained from the eight

checks and seven invoices, copies of which Mr. Weiss turned over on December 19, 1966 and got back on April 13, 1967. (No. 22609, C. T. 57, 96-100.)

Appellants might contend that, by opposing the existing summons—enforcement proceeding, they could not achieve the further goal of preventing the Government from getting information concerning Howfield, Inc., from various and sundry third persons, which would, as we understand the drift of their contentions, be tained in advance unless some new agent, wholly ignorant of the eight checks and seven invoices and of everything stemming from knowledge of them, were the one seeking the new information. The answer to such ambitious contentions is, we submit, that appellants simply have no standing to prevent the *acquisition* of information from independent, third-party witnesses, regardless of any right they might have to suppress the *use* of such evidence against them if and when the Government should attempt to use it against them in some future criminal case. See *DeMasters* v. *Arend*, 313 F. 2d 79 (C.A. 9th); *Foster* v. *United States*, 265 F. 2d 183, 187-188 (C.A. 2d), certiorari denied, 360 U.S. 912; *Zimmerman* v. *Wilson*, 105 F. 2d 583 (C.A. 3d); *Bouschor* v. *United States*, 316 F. 2d 451 (C.A. 8th); *Application of Magnus*, 299 F. 2d 335, 336-337 (C.A. 2d), certiorari denied, 370 U.S. 918; *Application of Cole*, 342 F. 2d 5, 7 (C.A. 2d); *O'Donnell* v. *Sullivan*, 364 F. 2d 43 (C.A. 1st).

Furthermore, insofar as equity jurisdiction is concerned—and that is the jurisdiction which, essentially, appellants invoke—the same considerations of

prematurity arise as have been discussed under Part I C, *supra*, and which were noted by this Court in *Hill* v. *United States*, *supra*. The overriding fact is that as yet there *is* no criminal case against appellants in existence. If such a case should arise in the future, appellants will then have ample opportunity to raise objections to any and all evidence which the Government might seek to introduce against them. See Rule 41(e) of the Federal Rules of Criminal Procedure.

In sum, we submit that, from any point of view, there was no basis here—accepting all of appellants allegations as true—for the equitable relief of injunction, and consequently there was no occasion for convening a three-judge district court, and the counterclaim was correctly dismissed.

Since appellants did not state a case for injunctive relief, and since the District Court correctly dismissed their counterclaim for that reason, there should be no occasion for exploring, here, the question of whether a substantial constitutional question was presented, which here is merely an additional reason for sustaining the District Court's refusal to seek the convening of a three-judge court. See *Bon Voyage Liquor Corp.* v. *Epstein*, 370 U.S. 713, 715. Nevertheless, we shall address the question briefly.

The crux of appellants' contention, concerning unconstitutionality, is (Br. 13, 18, 19) that Section 7602 authorizes a "demand" for the production of records without prior proof of probable cause for a search and seizure. This contention is, of course, wholly without

substance, since Section 7602 merely authorizes the issuance of a summons, which can be enforced only upon the Government's application to the District Court (as was done here), pursuant to Section 7402 (b) and 7604(a) of the 1954 Code, Appendix, *infra*. The person summonsed may appear and oppose the application or petition. See *Reisman* v. *Caplin*, *supra*. Thus, the statutory scheme requires the very intervention of a neutral judicial officer, the alleged absence of which appellants rely upon for their claim of unconstitutionality.[10]

Appellants also make some contention (Br. 14-15) to the effect that the "principal" or "primary" purpose of a Special Agent of the Internal Revenue Service (Intelligence Division) is to obtain evidence for a criminal proceeding. Thus, they virtually concede that such an agent also has other purposes. Even supporting, *arguendo*, that a sole purpose to investigate crime would vitiate the authority of an administrative summons, it is clear that the co-existence of a concededly valid purpose suffices to sustain the summons. See *Lash* v. *Nighosian*, 273 F. 2d 185 (C.A. 1st), certiorari denied, 362 U.S. 904.

In fact, this Court thoroughly analyzed this whole subject in *Boren* v. *Tucker*, 239 F. 2d 767, 772, and sustained an Internal Revenue summons issued (as in the present case) to determine whether tax deficien-

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[10] From their argument, one would suppose that appellants would prefer the drastic procedure of a search and seizure of their records, preceded only by a showing of probable cause before a magistrate at a hearing of which they had no notice.

cies existed and, if so, whether the deficiency was due to fraud, and if so, whether civil fraud penalties or criminal sanctions or both or neither should be recommended. There is little that can be added to that analysis. In a different context (the need for Fifth and Sixth Amendment warnings), this Court again evaluated the role of a Special Agent in *Kohatsu* v. *United States*, 351 F. 2d 898, certiorari denied, 384 U.S. 1011. Very recently, in *United States* v. *Mackiewicz*, F. 2d (involving the alleged lack of constitutional warnings), the Second Circuit noted the futility involved in any proposal to do away with special agents, in view of the inseparability of the criminal and civil possibilities inherent in a tax investigation. Also, it is worth nothing that the Supreme Court has rather recently subjected Section 7602 and cognate sections to close scrutiny, in cases where the fraud aspect of the investigation was a central factor, but expressed no doubt as to constitutionality. *Reisman* v. *Caplin*, *supra; United States* v. *Powell*, 379 U.S. 48. See also *Hannah* v. *Larche*, 363 U.S. 420, 441, 443, upholding powers of administrative investigation against the contention that the facts uncovered might lead to criminal prosecution, and see the appendix to that decision (pp. 454-485), listing numerous statutes conferring such powers. See also, *Oklahoma Press Publishing Co.* v. *Walling*, 327 U.S. 186, 195-196; *United States* v. *Morton Salt Co.*, 338 U.S. 632, 652.

Indeed, were it necessary to make the point, it could well be assumed that administrative investigations

are permissible even if the sole purpose were to uncover crime. We have occasionally seen arguments to the effect that there supposedly is a right to be investigated solely by a grand jury, but such arguments seem to be grounded only on the conceded rule that no one shall be put to trial on a charge of felony except on presentment by a grand jury. The summons powers conferred by Section 7602 constitute no infringement upon that bulwark of freedom, since the Internal Revenue Service, or any of its agents or officials, can do no more than merely recommend prosecution to the Department of Justice; if it agrees, the case goes to a United States Attorney for presentation to a grand jury, if the charge is of the requisite gravity, which must indict if there is ever to be a criminal trial.

In any event, contentions that special agents cannot utilize summonses because their purpose allegedly is to uncover crime have been repeatedly and uniformly rejected by the courts of appeals. See *Boren* v. *Tucker*, *supra*; *Wild* v. *Brewer*, 329 F. 2d 924 (C.A. 9th), certiorari denied, 379 U.S. 914; *Wild* v. *United States*, 362 F. 2d 206 (C.A. 9th); *In re Magnus, Mabee & Reynard, Inc.*, 311 F. 2d 12, 16 (C.A. 2d), certiorari denied, 373 U.S. 902; *Wright* v. *Detwiler*, 345 F. 2d 1012 (C.A. 3d); [11] *Sanford* v. *United States*, 358 F. 2d 685 (C.A. 5th); *Tillotson* v. *Boughner*, 333 F. 2d 515 (C.A. 7th), certiorari denied, 379 U.S. 913.

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[11] Affirming the District Court's enforcement order, the respondent asserted the criminal-purpose argument in the District Court (241 F. Supp., p. 755).

Appellants cite (Br. 15, 21) *Camara* v. *Municipal Court*, 387 U.S. 523; *See* v. *City of Seattle*, 387 U.S. 541; and *Mancusi* v. *DeForte*, 36 Law Week 4682 (decided June 18, 1968). None of these cases is relevant here. The first two of these cases involve statutes making it a crime to resist entry into one's premises (for a building inspection) without a warrant. The *DeForte* case held that a subpoena was no justification for a forcible entry, search, and seizure.

We submit that no substantial question concerning the constitutionality of Section 7602 has been raised.

CONCLUSION

For the foregoing reasons, the appeal in Case No. 22609 (the action for the suppression of evidence) should be dismissed for lack of appellate jurisdiction, since the order was not a final, appealable order; if it is deemed to be appealable, then the order should be affirmed, since the District Court properly dismissed the complaint as involving merely a premature request.

The order in Case No. 22602, denying a request to convene a three-judge district court and dismissing the counterclaim for lack of equity, should be affirmed, since appellants had an adequate remedy at law by opposing enforcement of the summonses, had no right or standing to prevent the use of summonses against third parties, and in any event presented no

substantial question concerning the constitutionality of the federal statutes involved.

Respectfully submitted,

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August, 1968.

CERTIFICATE OF SERVICE

It is hereby certified that service of the Brief for the Appellees in the above-entitled cause has been made upon opposing counsel by mailing ..... copies thereof to them, on this ..... day of ....., 1968 in an envelope (with postage prepaid) properly addressed to them as follows:

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APPENDIX

Internal Revenue Code of 1954 (26 U.S.C., 1958 ed.):

SEC. 7402. JURISDICTION OF DISTRICT COURTS.

* * * *

(b) *To Enforce Summons.*—If any person is summoned under the internal revenue laws to appear, to testify, or to produce books, papers, or other data, the district court of the United States for the district in which such person resides or may be found shall have jurisdiction by appropriate process to compel such attendance, testimony, or production of books, papers, or other data.

* * * *

SEC. 7602. EXAMINATION OF BOOKS AND WITNESSES.

For the purpose of ascertaining the correctness of any return, making a return where none has been made, determining the liability of any person for any internal revenue tax or the liability at law or in equity of any transferee or fiduciary of any person in respect of any internal revenue tax, or collecting any such liability, the Secretary or his delegate is authorized—

(1) To examine any books, papers, records, or other data which may be relevant or material to such inquiry;

(2) To summon the person liable for tax or required to perform the act, or any officer or employee of such person, or any person having possession, custody, or care of books of account containing entries relating to the business of the person liable for tax or re-

quired to perform the act, or any other person the Secretary or his delegate may deem proper, to appear before the Secretary or his delegate at a time and place named in the summons and to produce such books, papers, records, or other data, and to give such testimony, under oath, as may be relevant or material to such inquiry; and

(3) To take such testimony of the person concerned, under oath, as may be relevant or material to such inquiry.

* * * *

SEC. 7604. ENFORCEMENT OF SUMMONS.

(a) Jurisdiction of district court.

If any person is summoned under the internal revenue laws to appear, to testify, or to produce books, papers, records, or other data, the United States district court for the district in which such person resides or is found shall have jurisdiction by appropriate process to compel such attendance, testimony, or production of books, papers, records, or other data.

(b) Enforcement.

Whenever any person summoned under sections 6420(e)(2), 6421(f)(2), or 7602 neglects or refuses to obey such summons, or to produce books, papers, records, or other data, or to give testimony, as required, the Secretary or his delegate may apply to the judge of the district court or to a United States commissioner for the district within which the person so summoned resides or is found for an attachment against him as for a contempt. It shall be the duty of the

judge or commissioner to hear the application, and, if satisfactory proof is made, to issue an attachment, directed to some proper officer, for the arrest of such person, and upon his being brought before him to proceed to a hearing of the case; and upon such hearing the judge or the United States commissioner shall have power to make such order as he deem proper, not inconsistent with the law for the punishment of contempts, to enforce obedience to the requirements of the summons and to punish such person for his default or disobedience.

Title 28, United States Code:

SEC. 2282. INJUNCTION AGAINST ENFORCEMENT OF FEDERAL STATUTE; THREE-JUDGE COURT REQUIRED.

An interlocutory or permanent injunction restraining the enforcement, operation or execution of any Act of Congress for repugnance to the Constitution of the United States shall not be granted by any district court or judge thereof unless the application therefor is heard and determined by a district court of three judges under section 2284 of this title.

SEC. 2284. THREE-JUDGE DISTRICT COURT; COMPOSITION; PROCEDURE.

In any action or proceeding required by Act of Congress to be heard and determined by a district court of three judges the composition and procedure of the court, except as otherwise provided by law, shall be as follows:

(1) The district judge to whom the application for injunction or other relief is presented

shall constitute one member of such court. On the filing of the application, he shall immediately notify the chief judge of the circuit, who shall designate two other judges, at least one of whom shall be a circuit judge. Such judges shall serve as members of the court to hear and determine the action or proceeding.

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